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LUKE BRUGNARA

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

UNITED STATES OF AMERICA,

No. CR 14-00306 WHA

Plaintiff,

**OPPOSITION TO GOVERNMENT'S
MOTIONS IN LIMINE ONE
THROUGH SIX**

v.

LUKE BRUGNARA,

Date: December 10, 2014

Time: 8:00 a.m.

Defendant

Dept: WHA

The government filed six in limine motions. Motions numbered One through Three were filed on July 16, 2014 (Dkt. 46). Motions Four through Six were filed November 25, 2014 . Mr. Brugnara does not oppose Motion Number One. His response to the motions numbered Two through Six are set forth below.

A. Gov Motion No. 2: Defendant Must Be Allowed To Cross Examine Rose Long About Her Understanding of Her Arrangement With the Defendant

The government argues that the Court should preclude the defense from eliciting any testimony or making any statements regarding the existence of a contract between Rose Long and Mr. Brugnara.

1 Although the existence of a contract is not an element of the charges against Mr.
2 Brugnara, Ms. Long's perception of whether or not a contract existed between her and Mr.
3 Brugnara is relevant as to whether or not Mr. Brugnara defrauded Ms. Long. Ms. Long's
4 perception of whether a contract existed is relevant to whether or not Mr. Brugnara made
5 statements or omitted facts that were part of a scheme to defraud Ms. Long, which is one of the
6 elements required to prove mail fraud. 9th Cir. Model Criminal Jury Instructions section 8.121 –
7 Mail Fraud.
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9 The existence of a contract is also relevant with regards to Mr. Brugnara's mental state.
10 The government must show Mr. Brugnara intended to defraud Rose Long and had a plan for
11 obtaining money or property by means of false pretenses. The existence or not of a contract
12 between him and Ms. Long is relevant to those elements. In other words, if Mr. Brugnara
13 thought he had a contract with Ms. Long, and thought he was adhering to the terms of that
14 contract, there would be no intent to defraud.
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16 Therefore, although the jury will not be required to determine whether a contract existed
17 as a matter of law, they will be required to determine Mr. Brugnara's intent and Ms. Long's
18 understanding of her dealings with Ms. Brugnara. Accordingly, the Court should allow evidence
19 of the communications between defendant and Ms. Long.
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21 Moreover, it would a violation of Mr. Brugnara' Sixth Amendment right to confront the
22 witnesses against him to allow Ms. Long to testify that she was defrauded without allowing the
23 defense to cross examine her about her communications with Mr. Brugnara. The terms on which
24 she thought she agreed to sell the art to Mr. Brugnara are inextricably intertwined in that cross
25 examination.
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27 As a practical matter, Ms. Long is expected to testify at length about the existence of a
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1 contract between Mr. Brugnara and herself. It will be difficult, if not impossible, to cross-
2 examine her without her mentioning the existence of an agreement between Mr. Brugnara and
3 herself. This prohibition could also potentially make it difficult or impossible to impeach Ms.
4 Long with her testimony from the Rule 12 hearing. For all of these reasons, the government's
5 motion should be denied.
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7 **B. Gov Motion No. 3: Defendant Must Be Allowed To Impeach Rose Long's**
8 **Credibility**

9 Mr. Brugnara does not anticipate offering anonymous internet evidence of Ms. Long's
10 alleged past fraudulent art dealings.

11 However, Mr. Brugnara must be allowed to fully cross examine Rose Long to impeach
12 her credibility. The Sixth Amendment guarantees the right of a defendant to confront the
13 witnesses against him or her. Davis v. Alaska, 415 U.S. 308, 94 S. Ct. 1105, 39 L. Ed. 2d 347
14 (1974). See also Alford v. United States, 282 U.S. 687, 51 S. Ct. 218, 75 L. Ed. 624 (1931). This
15 right to confrontation is embodied substantially by the right to cross-examine adverse witnesses.
16 See Davis, supra, 415 U.S. at 315-16, 94 S. Ct. at 1109-1110; Skinner v. Cardwell, 564 F.2d
17 1381, 1388 (9th Cir. 1977), cert. denied, 435 U.S. 1009, 98 S. Ct. 1883, 56 L. Ed. 2d 392 (1978).
18 As the Ninth Circuit said in Burr v. Sullivan, 618 F.2d 583, 586 (9th Cir. 1980), "The right to
19 confront witnesses guaranteed by the sixth and fourteenth amendments includes the right to
20 cross-examine witnesses to show their possible bias or self-interest in testifying." Although a trial
21 court normally has broad discretion concerning the scope of cross-examination, a certain
22 threshold level of cross-examination is constitutionally required, and in such cases the discretion
23 of the trial judge is obviously circumscribed. As the court in Chipman v. Mercer, 628 F.2d 528
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1 (9th Cir. 1980), overruled on other grounds in United States v. Owens, 789 F.2d 750 (9th Cir. Cal.
2 1986), said:

3 the scope of cross-examination is within the discretion of the trial judge, this
4 discretionary authority to limit cross-examination comes into play only after there
5 has been permitted as a matter of right sufficient cross-examination to satisfy the
Sixth Amendment.

6 Id. (quoting States v. Elliott, 571 F.2d 880 (5th Cir.), cert. denied, 439 U.S. 953, 99 S. Ct. 349,
7 58 L. Ed. 2d 344 (1978)).

8
9 Federal Rule of Evidence 607 provides that "the credibility of a witness may be attacked
10 by any party." While the use of extrinsic evidence to impeach testimony brought out on
11 cross-examination is limited, a witness's testimony on direct examination may be impeached by
12 contradiction through use of extrinsic evidence, such as a rebuttal witness. See United States v.
13 Castillo, 181 F.3d 1129, 1132-33 (9th Cir. 1999). Such "impeachment by contradiction" attempts
14 to show the falsity of specific testimony by introducing contradictory evidence. See id. A district
15 court has "broad discretion over whether to admit extrinsic evidence to rebut a witness's direct
16 testimony, particularly on a matter collateral to the case." United States v. Chu, 5 F.3d 1244,
17 1249 (9th Cir. 1993).

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19 The government does not state precisely what evidence it is trying to exclude beyond
20 "unsubstantiated complaints posted on the Internet ... or other unsubstantiated allegations." Gov.
21 Motion at pp. 4-5. Defendant does not intend to introduce extrinsic evidence of anonymous
22 internet complaints about Rose Long. But he must be allowed to inquire of her on cross
23 examination about whether she has ever sold anyone art that was not authentic. Moreover,
24 whether she sold art using other names is relevant because she denied selling art using a website
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1 when the email address on the site was the same one she used to correspond with Mr. Brugnara
2 before he was arrested in this case.

3 **C. Gov Motion No. 4: Defendant Must Be Allowed To Impeach Rose Long and Walter**
4 **Maibaum's Credibility Regarding the Authenticity and Value of the Art**

5 The government cannot have it both ways. It has said for months that Mr. Brugnara is
6 guilty of stealing a very valuable Degas sculpture worth millions of dollars. The complaining
7 witness in this case, Rose Long, represented to Mr. Brugnara that these were authentic and
8 valuable pieces of art worth millions of dollars. The federal government would never have
9 charged this case as a federal wire fraud if it did not believe the pieces were valuable and
10 authentic.

11
12 Now the government asks this Court to shield its witnesses, and its case-in-chief, from
13 uncomfortable cross-examination and/or evidence about whether the art Rose Long represented
14 was genuine and valuable is in fact genuine and valuable. The court should reject this effort as
15 a denial of fundamental fairness and Mr. Brugnara's right to confront and cross examine the case
16 and witnesses against him. At the point, the government should not be allowed to have it both
17 way.

18
19 Defendant concedes that the government does not have to prove the actual market value
20 of the art that was shipped to Mr. Brugnara as an element in its case in chief. However, the
21 evidence must be admitted for other reasons.

22
23 Rose Long will tell the jury that she shipped pieces of art to the defendant that were made
24 by; DeKooning, Degas, and other lesser well-known but still famous artists. Unless the defense
25 is allowed to explore these issue of the art's authenticity and value by cross examination and/or
26 defense evidence, the jury will assume--just hearing the names of very famous artists-- the art is
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1 valuable. Defendant must be allowed to try and rebut that assumption. Moreover, Long will
2 testify that Mr. Brugnara represented to her that he would pay her millions of dollars for the art.
3 If the art shipped by Long really is genuine and valuable, then the government need not worry
4 about the strength of its case in chief. The fact that the government is trying to prevent the jury
5 from hearing any evidence to the contrary should give this court pause and be rejected..
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7 The case cited by the government, United States v. Oren, 893 F.2d 1057 (9th Cir. 1990) is
8 simply inapposite. The issue presented there was whether the district court correctly refused to
9 allow a defendant to introduce evidence of the value of a piece of land to show that he did not
10 intend to cause the victim to pay more than market value. He claimed that otherwise there was
11 not intent to defraud. The Ninth Circuit properly held that an intent to defraud did not require
12 an intent to cause someone to pay more than market value.
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14 Here, on the other hand, evidence of the authenticity and value of the art is directly
15 relevant to the credibility of the government chief witnesses, Rose Long and Walter Maibaum. It
16 is therefore imperative that the defendant be allowed to cross examine on those subjects.
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18 **D. Gov Motion No. 5: Defendant Must Be Allowed To Impeach Rose Long**

19 Defendant does not intend to argue that Rose Long is gullible. Quite the contrary.

20 Defendant does intend to argue, if the evidence at trial warrants, that Ms. Long and/or Mr.
21 Maibaum attempted to defraud defendant by selling him art that was not authentic, or was not
22 valuable, contrary to what he was told. Such evidence and argument would be relevant to their
23 credibility and must be allowed. Fraud is, of course, is a classic example of a crime involving
24 moral turpitude and therefore an appropriate basis on which to attack a witnesses credibility. If
25 defendant were to raise a reasonable doubt whether Mr. Maibaum and/or Ms. Long were
26 attempting to defraud Mr. Brugnara, they would be allowed to consider that fact in weighing their
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1 testimony. Counsel will not “blame the victim” as a legal defense, per se, but the credibility of
2 the victim is the entire case against Mr. Brugnara and a proper subject of both cross examination
3 and argument.

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5 **E: Gov Motion No. 6: Defendant Must Be Allowed To Introduce Evidence Of the**
6 **Complaining Witnesses Other Misconduct Rising to the Level of Moral Turpitude**

7 The government seeks to exclude probative and relevant evidence that would tend to
8 show that the two complaining witnesses, Rose Long and Walter Maibaum, are not credible.

9 First, Mr. Maibaum has a history of selling art under dubious circumstances. He bought
10 an alleged Picasso for thousand of dollars and then had his wife sell it just weeks later for
11 millions of dollars. Christies, the auction house involved in the deal, later sued for rescission.
12 Defendant must be allowed to cross examine Mr. Maibaum regarding his prior fraudulent
13 dealings, particularly when they bear such an obvious resemblance to the facts of this case. Rose
14 Long pretended to own certain pieces of art and offered to sell them to Mr. Brugnara. It turns out
15 she did not own all of the art and that it belonged to Mr. Maibaum. Defendant does not intend to
16 offer extrinsic evidence and turn this into a mini trial on the Christies case. But it is an
17 appropriate area of inquiry on cross examination.

18
19 As to Ms. Long, the government contends--apparently with a straight face--that Ms.
20 Long's conduct in (1) lying to a pharmacist to obtain prescription drugs, and (2) assaulting the
21 arresting officer, is not relevant to her credibility. Both contentions are wrong. An officer
22 responded to a pharmacy on a complaint that Rose Long was making a disturbance. The
23 pharmacist stated that Long erroneously told him her prescription had been given to someone
24 else. When the officer tried to escort her from the scene she assaulted him. She was arrested on
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1 misdemeanor charges of disorderly conduct and assault on an officer. The charges are apparently
2 still pending and unresolved.

3 Lying in order to obtain prescription drugs is clearly a crime of moral turpitude and
4 reflects adversely on a person's credibility. Ms. Long told a pharmacist that her prescription had
5 been given to someone else, not to her, but when the Memphis Police Department viewed the
6 video of the transaction it showed that Ms. Long had in fact picked up the medicine, thus proving
7 her statement to the pharmacist to be a lie. Such conduct clearly reflects poorly on her
8 credibility. Indeed, lying to obtain prescription drugs could have been charged as a felony if it
9 happened in the State of California.
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12 Second, although simple assault does not reflect on credibility, aggravated assault is
13 considered to be a crime of moral turpitude and does reflect negatively on a persons' veracity and
14 character for truthfulness. In the Ninth Circuit, an assault on a peace officer is considered an
15 aggravated assault:

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17 Some assault statutes, though, have been held to be CIMTs [crimes
18 involving moral turpitude]. Those statutes include as an element
19 "some aggravating dimension" sufficient to increase the culpability
20 of an assault or battery and so to transform the offense into one
21 categorically a CIMT. The "aggravating dimensions" recognized as
22 sufficiently increasing the culpability of an assault to turn an
23 assault into a CIMT have been the use of a deadly weapon, and a
24 victim who has a special status or trust relationship vis a vis the
perpetrator, such as a domestic partner or spouse, a child, or a
peace officer. As these categories of cases illustrate, to rise to the
level of moral turpitude, an assault crime must involve a particular
type of aggravating factor, one that says something about the
turpitude or blame-worthiness inherent in the action.

25 Uppal v. Holder, 605 F.3d 712, 716 (9th Cir. 2010)(internal citations omitted; emphasis added);
26 see also Nunez v. Holder, 594 F.3d 1124, 1131 & n.4 (9th Cir. 2010).

1 Defendant must therefore be allowed to cross examine Rose Long about (1) her
2 fraudulent attempt to obtain prescription medicine, and (2) her subsequent assault on the
3 arresting officer. Such evidence is relevant to and probative of her credibility.
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5 **CONCLUSION**

6 Based on the foregoing, defendant requests that the government's motions in limine be
7 denied.

8 DATED: December 3, 2014 /S/Erik Babcock
9 ERIK BABCOCK
10 Attorney for Defendant
LUKE BRUGNARA
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